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No. 97-889

In The

Supreme Court of the United States

October Term, 1997

CEASAR WRIGHT,

Petitioner,

vs.

UNIVERSAL MARITIME SERVICE CORP, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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RESPONDENTS' STATEMENT OF THE CASE

Petitioner's Brief contains a Statement of the Case which is, for the most part, unexceptionable. The physician's opinion recited in the first full paragraph on page 3 of the Brief was not presented to the employers until well after litigation had commenced, well more than a year after the purported "resorption" of the "bony spike." It is not true that "a grievance under the Bargaining Agreement was 'out of time'. . . [b]y the time petitioner located counsel." [Pet. Br. 4.] Petitioner's "offer to arbitrate" [Pet. Br. 4] was conditioned on a nonbinding result [J.A. 582, omitted Ex.7], for which reason the Respondents declined the offer. [J.A. 582, omitted Ex. 8] With these corrections, the Petitioner's version of the facts and the proceedings below, as set out in pp. 2-10 of his Brief, is essentially accurate.

SUMMARY OF ARGUMENT

At the inception of this case, Petitioner's union, acting as his representative, addressed the issues pertinent to Wright's attempted return to work as arising under the contractual provisions governing "qualification" to work. Although the union apparently suggested to Wright that he retain counsel, at no point did it refuse to pursue his grievance or otherwise reject his claims. When Wright chose to restrict his attention to his discrimination charges, he — not his union — abandoned the collectively bargained grievance procedure.

This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), while generally holding that arbitration as a choice of forum for "statutory" employment discrimination claims could be required by pre-dispute agreements, identified but found it unnecessary to address three distinctions between the facts in *Gilmer* and those presented seventeen years before in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974): (1) *Alexander,* as well as the later decisions in *Barrentine v. Arkansas – Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. West Branch,* 466 U.S. 284 (1984), construed the effect of adverse pre-litigation arbitration awards upon a grievant's ability to present his statutory discrimination claims in court, whereas *Gilmer* dealt with the

grievant's failure to pursue arbitration through the contractually-established procedure. (2) The existence of a collective-bargaining representative in *Alexander*, who would represent the grievant in the dispute resolution process, was deemed to create a possibility of a "tension" between individual and collective interests. (3) *Alexander* arose under the Labor-Management Relations Act, while *Gilmer*'s arbitration procedures were based on the Federal Arbitration Act.

None of these three concerns serves in any manner to require a different result in this case than that which obtained in *Gilmer*. Wright should have exhausted the grievance-and-arbitration procedures before resorting to litigation in federal court. Federal labor policy favors arbitrated resolution; the issue to be presented to the arbitrator was contractually required to conform to federal laws such as the Americans with Disabilities Act; Wright has shown no basis upon which it could be claimed that his union would not be able and willing to represent him fairly and fully; and Wright could, had he so desired, have prosecuted his grievance even without the assistance of his Local.

While the facts presented in this case do not fall neatly into a "conflict among the circuits" model, it is clear that the language of the two applicable statutes, Section 513 of the Americans with Disabilities Act and Section 118 of the Civil Rights Act of 1991, "encourage" arbitration of statutory discrimination claims, and neither Wright nor his supporting *amici* have borne their burden of proving a congressional intent to preclude arbitration.

Finally, *Gilmer* disposes of arguments regarding the "knowing and intelligent waiver" of statutory claims by explaining that no "rights" are lost; the contractual choice of forum effected by an agreement to arbitrate statutory discrimination claims remains subject oversight by the federal courts to ensure that the underlying purposes of laws prohibiting discrimination are protected.

There is no reason that this Nation's workforce should be artificially divided into two groups, one of which can be required by agreement to arbitrate statutory claims, while the other is free to ignore such contractual obligations. *Alexander*'s legacy has fulfilled

the need which created it, and its limitations on the use of arbitration under collectively-bargained agreements should be updated and redefined.

I. CLARIFYING THE FACTS

While, as noted above, there are only a few factual representations in Petitioner's Brief which warrant correction, it is critical to an understanding of this case to be aware that the facts do not fit squarely within the framework of a "conflict among the circuits." The National Academy of Arbitrators is accurate in its observation that "the *Austin-Pryner* conflict" — that is, the division between *Austin v. Owens – Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996), and such decisions as *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997)[1] — is not squarely apposite to the facts of this case. As the NAA explains it,

> These cases, unlike *Gilmer*, did arise under Section 301 and did involve collective bargaining rather than commercial agreements. But the issue in these cases was whether a non-discrimination clause in a collective bargaining agreement should be read as incorporating into the agreement the federal law prohibiting discrimination. . . .

(Brief of National Academy of Arbitrators as Amicus Curiae, p. 7).

However, the NAA's analysis of that distinction will not withstand scrutiny. The NAA agrees that "[t]he agreement in this case is atypical" because it lacks an "explicit limitation in the arbitration provision" which would confine the arbitrator "only to interpret and apply the provisions of the collective bargaining

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1. The so-called "*Pryner* line" of decisions includes opinions written after *Austin* but before *Pryner*, and generally encompasses all appellate decisions which have rejected the rationale of *Austin* for any reason. These cases are listed, along with district court decisions adopting the same views, *infra* at p. 31 *ff.*

agreement," simply stating that " 'matters under dispute' which are not settled in the grievance procedure are to be submitted to arbitration." (NAA Br. at 8, 9 *quoting* J.A. 432.) Notwithstanding these indisputable facts, the NAA posits that the lack of a nondiscrimination clause in the collective bargaining agreement and of specific reference to the ADA renders the decision below "breathtaking" and reversible.

If the NAA's agreement were correct, the writ of certiorari was improvidently granted, and the issue framed by the Petitioner is not before this Court after all. Instead, the NAA would have us ignore *Alexander*[2] to answer the question,

> Does the particular collective bargaining agreement authorize an arbitrator to interpret and apply the public law that the employee seeks to enforce and authorize the arbitrator to provide the remedies provided in the statute?

(NAA Br., pp. 12-13.)

How is this remarkable proposition derived? There is no citation supporting the question, although one may infer that the NAA believes *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), points in that direction. The NAA concedes that its argument is a "paraphrase" of *First Options*[3] (NAA Br. at 15); however, the paraphrasing is employed to erect a structure on a foundation of supposition and conjecture regarding the genesis of collective bargaining agreement language and the assumption that Wright's claim is dead "because the time for filing a grievance has

2. "[W]e do not believe that *Gardner-Denver* is the dispositive case." (NAA Br., p. 12).

3. *First Options* actually holds that if the parties have agreed that an arbitrator, rather than a court, is to determine the question of arbitrability, that bargain must be kept and the courts may not interfere: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 943, *quoting AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986), *and citing United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

expired." (*See* NAA Br., pp. 9 (presuming that Wright's workers' compensation claim was filed under the South Carolina Workers' Compensation Act rather than the Longshore and Harbor Workers Compensation Act), 9-10 (speculation about hypothetical issues of timeliness of filing a charge when no such issue exists), 10 ("both parties . . . adopted their agreement in light of *Gardner-Denver*").) The NAA would have this Court "declare that, in suits brought by employees to enforce statutory protections, collective bargaining agreements should not be found to require arbitration of such claims unless they clearly and explicitly so provide." (NAA Brief, p. 15.)[4] But that is not the question before the Court, and an answer to the NAA's query should await a case which presents such issue squarely.

II. CLARIFYING THE ISSUE

One amicus brief presents heated arguments for the proposition that *Gilmer* was wrongly decided, also urging this Court to consider such irrelevant "facts" as the "exorbitant costs to an employee" to vindicate rights through arbitration.[5] (Brief Amicus Curiae of

4. The NAA rather grudgingly concedes that it also opposes "mandatory arbitration" of *any* discrimination claim "when it requires waiver of direct access to a judicial forum." (NAA Br. at p. 6, n.8.) The author of that brief also published a post-*Gilmer* article contending that labor arbitrators are not competent to apply external law. Feller, "*Arbitration and External Law Revisited*," 37 St. Louis U.L. Rev. 973, 980 (1993). The NAA's position echoes that set out in Comment, "*Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*," 65 U. Chi. L. Rev. 225 (1998) (arguing that both *Austin* and *Pryner* were wrongly decided). It is clear, however, that ADA issues, for example, are arbitrated in significant proportions. *See e.g.*, Terrill, "*The Americans with Disabilities Act and Labor Arbitration: Recent Awards*," 48 Lab. L.J. 3 (1997).

5. An employee who pursues a grievance under a collective bargaining agreement incurs no costs; his labor organization represents him and provides counsel, if any, at no expense to the grievant. *See* J.A. 44a (I.L.A. and "Port Employers" each bear their respective costs, while arbitrator's fees and those of "any expert witness required by the arbitrator are to be borne jointly by the management and the Union of the port concerned.") *And cf.*, *Del Casal*

(Cont'd)

National Employment Lawyers Ass'n, *et al.* , pp. 3-28.)[6] Another seeks guidance regarding post-arbitration standards which courts should employ once exhaustion of the grievance-and-arbitration procedure has been completed. (Brief Amicus Curiae of Lawyers' Committee for Civil Rights Under Law and AARP, pp. 9-25). The AFL-CIO, Wright's own union, and his union local contend, in effect, that a union should be free to ignore the bargaining unit employees' rights to be free from discrimination, even arguing that "the union's representational authority does not extend [as] far" as to

> enter into a collective bargaining agreement which expressly provides for adjudication of statutory rights, and which expressly permits individual employee access to and control of that process.

(Brief Amici Curiae of AFL-CIO, ILA, and ILA Local 1422, p. 30, n.8.) The Attorneys General of fifteen states, while donning the clothing of "opposition to enforcement of mandatory arbitration clauses contained in collective bargaining agreements" (Brief Amici Curiae of Commonwealth of Massachusetts , *et al.*, p. 1), actually attack *any* procedure which limits the "good public policy" of making "a judicial forum available for vindication of important statutory rights under various statutes that govern the employment relationship" (*op.*

(Cont'd)
v. Eastern Airlines, 465 F. Supp. 1254 (S.D. Fla. 1979), *aff'd*, 634 F.2d 295 (5th Cir. 1981) (Railway Labor Act: refusal to provide attorney because grievant was not a union member constituted unfair representation but arbitration award was binding because grievant was represented at the hearing by personal attorney). *Compare, Shankle v. B.G. Maintenance Management of Colorado, Inc.*, 74 FEP Cas. 94, 70 EPD ¶ 44,737 (D. Colo. 1997) (agreement requiring individual employee to bear one-half of arbitration costs is unenforceable).

6. This same spurious "cost" argument is raised by the Lawyers Committee for Civil Rights, Under Law and the AARP in their Brief at pp. 16-17.

cit., p. 8), a posture which mounts a wholesale assault on *Gilmer* itself.[7]

The United States and the Equal Employment Opportunity Commission raise all the contentions used by EEOC in support of its position that arbitration of statutory disputes should not be permitted (*see* EEOC "Notice," "Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment," July 10, 1997, BNA Fair Emp. Prac. Manual 405:7511, *discussed in Duffield v. Robertson Stephens & Co.*, __ F.3d __, __, 76 FEP Cas. 1450, 1456 (9th Cir. 1998 *and in DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997)), but carefully skirt the fact that those arguments also are applicable to arbitration under the Federal Arbitration Act and, therefore, to *Gilmer.* And the ACLU's emphasis on "knowing and voluntary waiver" is yet another criticism of the *Gilmer* rationale. (Brief Amicus Curiae of American Civil Liberties Union and the ACLU of South Carolina, pp. 7-9, positing that "with the partial exception of the Ninth Circuit, the lower courts have consistently failed to test purported arbitration agreements against" the "well-established standard" of "knowing, intelligent, and voluntary . . . waivers of the right to a judicial forum for individual statutory employment discrimination claims.")

None of these arguments is pertinent to the issue presented here, which Petitioner describes as whether "a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute." (Petitioner's Brief, p. *i*; *and see*, Petition for Writ of Certiorari, p. *i.*) Actually, that is not the issue either. Under the facts of this case, the question for resolution by this Court is whether an employee whose union has negotiated a collective bargaining agreement with an employer must pursue his remedies under the grievance-and-arbitration procedure of that

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7. One can only wonder whether these states' interest in allowing their citizens access to the courts extends to the point of encouraging those citizens to sue the state for discrimination in derogation of an agreement or a statutory provision requiring use of alternative forums or procedures.

agreement before resorting to litigation over an issue which is well within the ambit of questions capable of submission to arbitration. The question for the arbitrator would have been whether Wright was "qualified" to return to work — a question which was contractually required to be answered by reference to statutory standards. The arbitrator would, therefore, have resolved the question of Wright's "qualifications" in such a way as to comport with the requirements of the Americans with Disabilities Act.

III. *ALEXANDER* — A RETROSPECTIVE VIEW

At common law, agreements to arbitrate future disputes were not subject to specific enforcement. *See Allied – Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270-71 (1995) and cases cited therein. However, this traditional antipathy to arbitration as a dispute resolution procedure has yielded to both statutory modification and the realities of a litigation-prone society, to the point that a party which seeks to avoid the effect of an agreement to arbitrate now has the burden of showing what amounts to an affirmative defense — a statutory preclusion of arbitration of the subject matter. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). As this Court put it in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991),

> If such an intention [to foreclose arbitration] exists, it will be discoverable in the text of [the statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes . . . [keeping] in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

Gilmer, 500 U.S. at 26, *quoting*, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), and *McMahon*, *supra*, at 227.

The *Gilmer* decision disposed of virtually all of the bases upon which an agreement to arbitrate statutory claims could be disregarded, concluding in the context of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 621 *et seq.*, that:

(a) "[N]othing in the text of the ADEA or its legislative history explicitly precludes arbitration." 500 U.S. at 26.

(b) Although the ADEA "is designed not only to address individual grievances, but also to further important social policies," there is no "inherent inconsistency between these policies . . . and enforcing agreements to arbitrate age discrimination claims." 500 U.S. at 27.

(c) "Arbitration will [not] undermine the role of the EEOC," since "the EEOC's role in combating age discrimination is not dependent on the filing of a charge," "[s]uch [employment] disputes can be settled . . . without any EEOC involvement," and "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." 500 U.S. at 27-28.

(d) "[S]uspicion of arbitration" is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 500 U.S. at 30, *quoting Rodriguez de Quijas v. Shearson/American*

  (1) A speculation "that arbitration panels will be biased" is inappropriate, since this Court " 'decline[s] to engage in the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators,' " and "[t]here has been no showing in this case that [contractual] provisions are inadequate to guard against potential bias." 500 U.S. at 30-31, *quoting Mitsubishi*, *supra*, at 634.

  (2) Although "discovery allowed in arbitration is more limited than in the federal courts . . . , by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,' " further counterbalanced by the fact that "arbitrators are not bound by the rules of

evidence." 500 U.S. at 31, *quoting Mitsubishi*, *supra*, at 628.

(3) "A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions," but where written awards are required and the courts will continue to publish opinions construing the statute, such concerns are of no more moment than is the allowance of settlements of statutory claims. 500 U.S. at 31-32.

(4) Limitations on judicial review of arbitration awards do not make such review " 'insufficient to ensure that arbitrators comply with the requirements of the statute.' " 500 U.S. at 32 n.4, *quoting McMahon*, *supra*, at 232.

(5) The absence of broad equitable relief and other remedial power does "not preclude the EEOC from bringing actions seeking class-wide and equitable relief," nor should one presume that arbitrators have no power to issue a make-whole remedy. 500 U.S. at 32.

(e) Contentions of inequality of bargaining power are meritless unless they rise to the level of " 'such grounds as exist at law or in equity for the revocation of any contract,' " such as " 'fraud or overwhelming economic power.' " Such a claim "of unequal bargaining power is best left for resolution in specific cases." 500 U.S. at 32-33, *quoting* 9 U.S.C. §2 and *Mitsubishi*, *supra*, at 627.

The *Gilmer* decision then turned to the question of the continuing vitality and applicability of this Court's 1974 holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36. Much of the rationale of *Alexander* was overruled, including "the view that arbitration was inferior to the judicial process for resolving statutory claims":

> "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

500 U.S. at 34 n.5, *quoting Mitsubishi*, *supra*, at 626-27.

While noting several distinguishing features of the factual contexts in *Alexander* and in *Gilmer* [8], the decision in the latter case only identified three "important distinctions between the *Gardner-Denver* line of cases and the case before us." 500 U.S. at 35. These were:

(1) *Alexander*, as well as the two later decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. West Branch*, 466 U.S. 284 (1984), arose out of election-of-remedies contexts in which the plaintiff had pursued claims through arbitration and had lost, whereupon the employer interposed the award as a bar to plaintiff's separately-filed statutory claims.[9] Therefore, "those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite-different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." 500 U.S. at 35. The Court explained: "Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in these cases understandably

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8. "[A]n employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights" (*Gilmer*, 500 U.S. at 34, *citing Alexander*, *supra*, at 49-50); "a labor arbitrator has authority only to resolve questions of contractual rights"; a Title VII action " 'is asserting a right independent of the arbitration process' "; *Alexander* expresses "a concern that in collective-bargaining arbitration 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.' " *Gilmer*, 500 U.S. at 34, *quoting Alexander* at 49-50, 53-54, 58.

9. *Alexander* involved a Title VII race discrimination claim, *Barrentine* a claim under the Fair Labor Standards Act, and *McDonald* dealt with allegations under 42 U.S.C. § 1983.

was held not to preclude subsequent statutory actions." *Id.*

(2) "[B]ecause the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." *Id.*

(3) "Finally, those cases were not decided under the FAA, which . . . reflects a 'liberal federal policy favoring arbitration agreements.' " *Id, quoting Mitsubishi, supra,* at 625.

Summarizing these holdings, the Court stated: "We conclude that Gilmer has not met *his burden* of showing that Congress, in enacting the ADEA, *intended to preclude arbitration* of claims under that Act." *Gilmer*, 500 U.S. at 35. (Emphasis supplied).

A. There Is No Distinction Between the FAA and the LMRA as to Federal Policy.

What, then, remains of *Alexander*? The third "distinction" is one which requires little discussion. It makes no difference whether the Federal Arbitration Act or the Labor-Management Relations Act forms the basis for the agreement to arbitrate, since there is a "liberal federal policy favoring arbitration agreements" in both contexts. The presumption of arbitrability under collective-bargaining agreements was recognized clearly in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 451 (1957), holding that Section 301(a) of the LMRA

> authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.

This holding contradicted Justice Frankfurter's dissenting opinion, in which it was argued that labor arbitration was somehow of lesser dignity than commercial arbitration; *see* 353 U.S. at 466-69.

1. *Arbitration is the favored procedure for resolving labor disputes — including "individual" and "statutory" claims.*

At least from *Lincoln Mills* forward, this Court has continued to reiterate its endorsement of labor arbitration as a preferred venue for the resolution of employment disputes. And while Justice Frankfurter's dissent in that case deemed the majority's lack of mention of the FAA as a "silent" rejection of the applicability of that statute to collectively-bargained arbitration agreements (353 U.S. at 466), decisions construing the FAA and the LMRA have run on parallel tracks ever since. Elkouri & Elkouri, HOW ARBITRATION WORKS (5th ed. 1997), p. 31.

The Elkouri treatise follows this evolution from the "*Steelworkers Trilogy*,"[10] in which this court "enunciated the now well-known presumption of arbitrability of labor disputes," through the strengthening and expansion of that presumption[11] in a parade of decisions: *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (state courts may enforce collective bargaining agreements, including arbitration clauses); *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962) (implying a no-strike obligation regarding issues subject to arbitration); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (individual employees can sue under Section 301 to enforce "uniquely personal" rights under a collective

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10. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 493 (1960).

11. *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974) (decided only a few months after *Alexander*), extended the presumption of arbitrability to the question of whether a strike was statutorily protected by 29 U.S.C. § 143, a statute which was deemed by the Third Circuit to disfavor compulsory arbitration of safety disputes. 466 F.2d 1157 (3d Cir. 1972). Although there was no no-strike clause in the collective bargaining agreement, this Court recognized such an obligation was inherent in the collective bargaining relationship.

bargaining agreement); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) (once a court decides the issue is arbitrable, the arbitrator should decide both procedural and substantive issues under the agreement); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (an employee who wishes to pursue claims under the agreement must first exhaust the agreement's grievance and arbitration procedure); *Boys Markets v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (binding arbitration is the quid pro quo for an agreement not to strike, requiring a Court to enjoin the strike and compel arbitration of the underlying dispute).

This was the state of the law at the time of the *Alexander* decision, and the pace of encouraging and deferring to the arbitral process accelerated during the period between *Alexander* and *Gilmer*. Milestones along that path include *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974), reaffirming the implied no-strike duty as to (statutory) safety issues; *Nolde Bros v. Bakery & Confectionery Workers, Local 358*, 430 U.S. 243 (1977), allowing arbitration of grievances which arose, or even arguably arose, prior to contract expiration; *Allis-Chalmers Mfg. Co. v. Lueck*, 471 U.S. 202 (1985), finding claims under state law which are based upon a collective bargaining agreement to be preempted, so that failure to pursue the contract grievance is fatal to the claim; and culminating in the reiteration of the language of *Warrior & Gulf Navigation Co.* in *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986):

> "An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

(*Quoting Warrior & Gulf, supra*, 363 U.S. at 582-83.)

AT&T contains a thorough catalogue of the reasons for "the presumption of arbitrability for labor disputes," which "recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements" and " 'furthers the National Labor Policy of peaceful resolution of labor disputes and this best

accords with the parties' presumed objections in pursuing collective bargaining.' " 475 U.S. at 650, *quoting Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984).

2. *Deferral to arbitration — two concepts sharing a single name.*

For well over a decade, and well before *Gilmer*, the National Labor Relations Board has conferred substantial authority upon arbitrators to resolve legal and statutory issues, a subject analyzed in Hardin, ed., THE DEVELOPING LABOR LAW (3d ed. 1992) (hereinafter, "*DLL*"), ch. 18, pp. 1009 *ff.*[12] A brief digression appears necessary to distinguish between the two doctrines generally lumped together as "deferral" to the arbitration process by the NLRB. Prearbitral, or "*Collyer,*" deferral, so-called because it was developed in a line of Board decisions emanating from *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), results in the Board's ceding jurisdiction over an unfair labor practice case to an arbitrator; *Spielberg*[13] deferral, on the other hand, is Board acceptance of the outcome of an arbitration proceeding.

Both forms of deferral have limitations which the Board has developed over time. *Spielberg* deferral generally requires that four preconditions be met: (1) the arbitration procedures must be "fair and regular"; (2) all parties must agree to be bound by the arbitrator's award; (3) the arbitrator's decision cannot be deferred to if it is "repugnant to the purposes and policies" of the Labor Management Relations Act; and (4) the statutory unfair labor

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12. This expansion of — or, more accurately, this return to — earlier Board precedent commenced in 1984 with *United Technologies Corp.*, 268 N.L.R.B. 557, and *Olin Corp.*, 268 N.L.R.B. 573 (1984). *See generally, Hammontree v. NLRB*, 925 F.2d 1486, 1503 (D.C. Cir. 1991) (Edwards, J., concurring), which suggests that labor organizations possess the authority to waive the statutory rights of members of the bargaining units they represent in exchange for roughly equivalent contractual rights, supporting that conclusion with specific reference to the *Alexander – Barrentine – McDonald* decisional line. *Hammontree* is analyzed *infra* at pp. 17-21.

13. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

practice issue must have been presented to and considered by the arbitrator.[14]

Collyer deferral is a much more flexible concept. While judicial deference to the grievance-and-arbitration procedure, manifested by a requirement of exhaustion of those processes unless they can be shown to be "futile," has long been the standard, the NLRB has never applied the exhaustion principle as a rigid requirement. *DLL* at 1019. As explained in *United Technologies Corp.*, 268 N.L.R.B. 557, 558 (1984), the analysis is multifaceted (numbering supplied):

> (1) The dispute arose within the confines of a long and productive collective bargaining relationship; (2) there was no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompassed the dispute at issue; (5) the employer had asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute was eminently well suited to resolution by arbitration.

This Court, in *William E. Arnold Co. v. Carpenters District Council of Jacksonville & Vicinity*, 417 U.S. 12, 16 (1974), decided the same term as *Alexander*, expressed the view, albeit in dictum, that pre-arbitral deferral by the Board "harmonizes" with Congress' desire to encourage use of contractual dispute resolution processes. A decade earlier, deferral to arbitration of inter-union jurisdictional disputes was blessed in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964):

> However the dispute be considered . . . we see no barrier to use of the arbitration procedure. . . . By allowing the dispute to go to arbitration its

14. The first three criteria are found in *Spielberg*; the fourth, however, is of more recent vintage, and its parameters are imprecise. *DLL*, pp. 1018-19 (fourth element is "rather variably administered," and may require only that it is not "evident" that the unfair labor practice issue was neither presented nor considered in the arbitration).

> fragmentation is avoided to a substantial extent. . . . Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.

The analogy between pre-arbitration deferral standards used by the NLRB under *Collyer* and this Court's decision in *Gilmer* is informative: in *Gilmer*, this Court eschewed the six-part *Collyer* model (which it has never specifically endorsed), opting for the much less formalistic approach discussed above. But while there are definite parallels between the *Collyer* and *Gilmer* formulae, in *Alexander* this Court appeared to adopt a bright-line test, refusing to defer to *any* arbitral decision of an employment discrimination claim, thus avoiding any reliance upon *Spielberg* (or any other) standards. *See* 415 U.S. at 55, 56 and n.17 (declining to adopt *Spielberg* tests). Upon more careful study, however, it appears that the general approach of *Alexander* can be harmonized with that employed under *Spielberg*.

3. *Hammontree — reconciling Alexander with national labor policy.*

In *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991), a union member brought an unfair labor practice charge against his employer, Consolidated Freightways Corporation, alleging he had been retaliated against for filing earlier grievances against Consolidated under the collective bargaining agreement between Consolidated and his union, a Teamsters local. The National Labor Relations Board held that Hammontree's claims should have been presented through the grievance procedure of the collective bargaining agreement. *Consolidated Freightways Corp.*, 288 N.L.R.B. 1252 (1988). After a panel decision (894 F.2d 438 (D.C. Cir. 1990)) which remanded the case to the NLRB with instructions, rehearing *en banc* was held.

The majority of the Court, including two judges who now sit as Justices of this Court, analyzed the two NLRB policies which are both characterized as "deferral," but observed preliminarily that

> the Board's two "deferral" policies operate in different ways and serve different purposes. [footnote omitted] Pre-arbitral deferral (what we will, for

> clarity's sake, call "*deferment*") resembles the exhaustion requirements often found in administrative regimes and the abstention doctrines followed by federal courts. Post-arbitral deferral (what we will call "*deference*") resembles appellate judicial deference.

925 F.2d at 1490.

Under this analytical model, *Alexander – Barrentine – McDonald* "deferral" is

> an unfortunate misnomer. "Post-arbitral deferral" is not deferral at all, but deference, a limitation on the scope of the Board's review of arbitration awards. More importantly, pre- and post-arbitral deferral differ substantially in justification and in practice.

Hammontree, 925 F.2d at 1491 n.8. Thus, the issue presented in *Hammontree* was one of exhaustion of the grievance procedure — "deferment" — along the lines which this Court would establish later that year in *Gilmer* — "the now-familiar two-step analysis set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984)," summarized as "*Chevron I*" and "*Chevron II.*" "*Chevron I*" determinations consider "whether Congress has directly spoken to the precise issue in question" and, in so doing, has affirmatively prohibited an exhaustion-of-remedies process. *Chevron*, 467 U.S. at 842-43 and n.9. If, however, "the statute is 'silent or ambiguous with respect to the specific issue,' and if 'the agency's answer is based on a permissible construction of the statute,' we must defer." *Hammontree*, 925 F.2d at 1491, *quoting Chevron* at 843.

The majority in *Hammontree* carefully considered the "*Chevron I*" arguments presented in that appeal and found no clear expression of Congressional intent to preclude the arbitration of statutory discrimination claims under Section 8(a)(3). Among the contentions considered and rejected in *Hammontree* is one which is urged once more in this case — that Section 203(d) of the Labor-

Management Relations Act, 29 U.S.C. § 173(d),[15] implicitly limits its endorsement of grievance and arbitration settlements to "contract disputes":

> Initially, we observe that §203(d) reads most naturally as a general policy statement in favor of private dispute resolution, not as any kind of limitation on Board authority. [footnote omitted] But even if we were to assume *arguendo* that §203(d) does in some way limit the Board's deferment authority, Hammontree's argument fails on its own terms, for his §8(a)(3) claim *does* "aris[e] over [contract] application or interpretation." Hammontree's discrimination claim, although raised under §§ 8(a)(1) and 8(a)(3), is also actionable under the contract.

925 F.2d at 1493.

The *Hammontree* majority also refused to accept another linchpin of Wright's argument, as well as that of several *amici* supporting his position, that the statutory preference for private dispute resolution is only involved when "the [individual] employee has [ ] *voluntarily* submitted his [ ] claim to arbitration' " [*quoting*, with supplied emphasis, Chief Judge Mikva's dissenting opinion, 925 F.2d at 1510].

> To contend that Congress' decided preference" —and a collectively bargained arbitration clause — can be automatically defeated at the option of an aggrieved employee is not only contrary to congressional intent, but also inconsistent with the fundamental tenet of labor law that a sound collective bargaining agreement binds all employees.

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15. Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

925 F.2d at 1494, n.15. And, finally, this "voluntary individual agreement" contention would, if accepted, lend itself to game-playing by the union, since " 'a union could circumvent the contractual grievance procedure by the simple expedient of having the individual employee, instead of the union, file the charge with the Board.' " *Consolidated Freightways Corp.*, 288 N.L.R.B. 1252, 1255 (1988), *quoted in Hammontree,* 925 F.2d at 1494 n.15.

Having disposed of the "*Chevron I*" test, the court in *Hammontree* proceeded to deal with the employee's assertion that *Alexander v. Gardner-Denver Co.* forecloses arbitration of cases involving "individual employee rights." Reviewing the *Alexander* rationale, as further addressed in *Barrentine* and *McDonald*, the court rejected Hammontree's argument that, because of those decisions, " 'individual statutory rights cannot be sacrificed on the altar of arbitration' " and that "these cases limit the Board's discretion to defer claims in which an individual seeks to vindicate personal rights under the NLRA." *Hammontree*, 925 F.2d at 1496. The Court stated:

> We disagree. In *Alexander, Barrentine,* and *McDonald*, the Supreme Court held that when individual statutory rights are at stake, arbitration of a contractual claim does not preclude a subsequent statutory claim. In this case, however, we consider not the preclusive effect of arbitration awards but rather the Board's authority to require the exhaustion of arbitration remedies. These issues are analytically distinct ... Deferment does not diminish Hammontree's right to a public forum; it merely delays it.

925 F.2d at 1496-97.

Both the majority opinion in *Hammontree* and the concurrence authored by Judge Edwards point out, however, that this Court's decisions proceeding from *Alexander* have established a seeming distinction for the "individual rights and remedies" created under Title VII of the Civil Rights Act of 1964, the Fair Labor Standards

Act, and the Civil Rights Act of 1871, which were deemed in *Alexander*, *Barrentine,* and *McDonald* to be "independent of any contractual rights and remedies." 925 F.2d at 1500 (Edwards, J., concurring), *quoting Alexander,* 415 U.S. at 54, 50 and *Barrentine*, 450 U.S. at 745, 740. Both the majority and the concurring opinions also note that exhaustion of arbitration remedies under Title VII is seemingly inconsistent with this Court's refusal to permit a tolling of procedural time limits in order to permit pursuit of the contractual grievance processes. *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 239 (1976); *see Hammontree*, 925 F.2d at 1497-98 (majority op.), 1500-01 (concurring op.); and *see Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) (filing of Title VII discrimination charge does not toll statute of limitations applicable to 42 U.S.C. § 1981 claim).[16]

But the *Hammontree* court spoke without the benefit of this Court's decision in *Gilmer*, and the decisions which rely on or refer to *Alexander* do not, especially when the impact of *Gilmer* is considered, require the *dictum* of *Hammontree*'s discussion of "employment" discrimination claims, as differented from "labor law" discrimination claims, to be perpetuated, as becomes clear when a post-*Gilmer* analysis of *Alexander* is made.

B. There Is No "Tension" Here Between Collective Representation and Individual Rights.

1. *Unfair representation cannot be presumed.*

If the "important concern" identified in the *Gilmer* discussion of *Alexander* as "the tension between collective representation and individual statutory rights" (*Gilmer*, 500 U.S. at 35) were in fact an integral part of the *Alexander* rationale, it is curious that this "concern" appears only in a footnote: "In arbitration, as in the

16. There is, however, no issue regarding the timely filing of a charge of discrimination. No party to this or comparable cases has contended that the requirement of exhaustion of remedies deprives the *EEOC* of jurisdiction to investigate and attempt conciliation of charges. The exhaustion requirement applies to *litigation*, not administrative action. *See Gilmer*, 500 U.S. at 27-28.

collective bargaining process, the interest of the individual employee may be subordinated to the collective interest of all employees in the bargaining unit." 415 U.S. at 58 n.19. At the time and in the context of the decision in *Alexander,* discriminatory behavior by unions was a concern which was no less important that discrimination by employers. The first decade of Title VII enforcement resounded with class actions challenging collectively-bargained seniority systems, union complicity in employers' biased practices and policies, and other conduct which would be wholly unsuitable for resolution through the arbitral process.[17] Moreover, in a case in which the complaining employee does not share the race, gender, or ethnic background of a majority of the bargaining unit, — which is not the pattern presented here — the risk of unfair representation *may* be real. Notwithstanding those assumptions, however, a labor organization is legally bound to provide fair representation to all members of the bargaining unit,[18] and a presumption that pursuit of a grievance to arbitration would be "futile" is one which should not arise in the absence of evidence, as opposed to stereotypical conjecture.[19]

17. Often, unions and employers were named as co-defendants in such cases. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Syst. v. Rodriguez*, 431 U.S. 395 (1977); *America Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). In fact, *Alexander*'s footnote 19 concludes with the observation that it is "noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employees." 415 U.S. at 58 n.19.

18. Discrimination, including racial bias, by a union breaches its duty of fair representation. *Longshoremen (ILA) Local 367 (Galveston Maritime Ass'n)*, 148 N.L.R.B. 897 (1964), *enf'd*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

19. As a precondition to bringing suit for breach of a collective bargaining agreement,

> individual employers wishing to assert contract grievances must *attempt* use of the contract grievance procedure . . . [T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf.

Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 653 (1965) (emphasis (Cont'd)

In the case at bar, why should it be assumed that Caesar Wright, a member of ILA Local 1422 for nearly 30 years, has been victimized by his fellow Longshoremen? Wright's return to work would have prejudiced no one in the Union, and it is foolish to contend that Local 1422 engaged in discrimination against Wright on any basis. Nor has Wright contended that he was unfairly represented; the record is devoid of any such accusation, although several of the *amici* seem enamored of this idea.[20] It is certainly possible to construct a hypothetical set of facts in which the "majoritarian" impulse of a labor organization might trump its desire to afford fair representation to individual interests. But to conclude, without any evidence, that this "concern" automatically renders arbitration unavailable as a remedy would deprive unions of *any* authority, as well as any incentive, to present individual grievances.

2. *Wright could have pressed his own grievance.*

A bargaining unit member whose union refuses to pursue his grievance to arbitration has at least two choices other than acquiescence: He may claim unfair representation in an unfair labor practice charge filed with the NLRB or a civil action in court,[21] or may instead go his own way, prosecuting his own grievance. Section 9(a) of the Labor Management Relations Act, 29 U.S.C. § 159(a), after generally stating the principle that representation by a certified or recognized collective bargaining representative is exclusive, ends with two provisos modifying that concept:

> *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the

(Cont'd)
in original). The burden of proving the futility of such exhaustion rests on the plaintiff. *Glover v. St. Louis – San Francisco Ry.*, 393 U.S. 324 (1969); *and see Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

20. *See, e.g.*, Brief for the United States and the Equal Employment Opportunity Commission, pp. 9, 14-20.

21. Either of the procedures requires compliance with the six-month statute of limitations found in 29 U.S.C. § 160(b).

> bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

This is the rule explained in *Maddox*: since the individual may not "completely sidestep available grievance procedures in favor of a lawsuit," 379 U.S. 653, exhaustion must be attempted.[22]

The *Maddox* rationale was further developed in *Vaca v. Sipes*, 386 U.S. 171 (1967). In language which is particularly instructive, Justice White spoke for the Court in explaining why exhaustion of grievance procedures is not an inflexible precondition to the pursuit of contract based claims:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

386 U.S. at 185. Only two "circumstances" warranting a failure to exhaust were identified: (1) "when the conduct of the employer amounts to a repudiation of those contractual procedures," *id.*, or

22. In language remarkably applicable to our facts, Justice Harlan concluded his majority opinion in *Maddox* with the observation that

> the case is before us on stipulated facts; in neither the facts or the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting . . . and bringing a court suit.

379 U.S. at 659. *And cf., Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50, 61 n.12 (1975) (explaining the proviso permitting individual presentation of grievances so long as the union has been given the opportunity to present the grievance, and noting that an employer need not agree to entertain the employee's presentation).

> if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance,

which the Court deemed to require the non-exhausting plaintiff to "prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 185, 186. *And see, Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

The *Maddox – Vaca – Hines* model is thus illustrative of the answer to the questions raised in *Alexander*: The plaintiff may not simply assert that exhaustion to, and through, arbitration would be unavailing or "controlled" by the union; he must prove what efforts he made to pursue his contractual remedies and the manner in which the union is unresponsive or incapable of asserting his claims. Any lesser burden on the plaintiff renders the contractual grievance procedure a nullity for any issue which implicates statutory issues.

3. *The employer cannot negotiate agreements with bargaining unit employees.*

Yet another illogical result of the refusal to extend *Gilmer* to collectively bargained arbitration processes is the apparent invitation that presents to employers to secure agreements with bargaining unit members which would elect arbitration as a forum for the resolution of "employment law" claims, including those based on statutes such as the ADA. But this Court has repeatedly found that an employer violates its duty to bargain when it relies on, or attempts to negotiate, employment contracts with individual bargaining unit members. *J.I. Case v. NLRB*, 321 U.S. 332, 337-38 (1944); *NLRB v. Insurance Agents*, 361 U.S. 477, 484-85 (1960); *and see, Moise & Son Trucking*, 197 N.L.R.B. 198 (1972) (violation of § 8(a)(5) found when employer sought individual contracts with employees after having recognized union).

C. Agreements to Arbitrate Statutory Claims.

The final distinction of *Alexander* made by this Court in *Gilmer* has two parts: First, *Alexander, Barrentine,* and *McDonald* were concerned with the effect of an arbitration award upon a subsequent discrimination claim in federal court: not "the enforceability of an agreement to arbitrate statutory claims," but "the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer*, 500 U.S. at 35. Consequently, *Alexander* does not apply where exhaustion, rather than election, of remedies is at issue.[23]

The second element of the *Alexander/Barrentine/McDonald* facts which was not found to be present in *Gilmer* was that "[s]ince the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Gilmer*, 500 U.S. at 35. Parsing this sentence requires that one refer back to the facts of *Alexander, Barrentine,* and *McDonald.*

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23. The *amicus* brief filed by the United States and the EEOC contends that

> *Alexander* cannot be distinguished on the ground that the employee in *Alexander* first proceeded through arbitration, while petitioner did not. To the contrary, petitioner here invoked his contractual remedies and took them as far as he could, *i.e.*, until the union informed him that it would not pursue them further.

(Brief for the United States and EEOC, p. 9). But the Government does not understand the facts. Wright never pressed the union to "pursue" his grievance, and the union merely "recommended that he retain a private attorney." (Stipulation 22, J.A. 55a.) When Wright did apply pressure to Local 1422, it engineered a purported "second" grievance, which formed the genesis for an action filed fifteen months thereafter, and thirty-two months after the refusal to allow Wright to return to work, brought by the Local under 29 U.S.C. § 185. This suit, filed after the Fourth Circuit had affirmed the dismissal of Wright's claims, was dismissed by an unpublished order and is now pending before the Fourth Circuit. *See* Petitioner's Brief, p. 9, n.4.

1. *Alexander v. Gardner-Denver Co.*[24]: Harrell Alexander, Sr. was a drill operator trainee who was discharged because Gardner-Denver, his employer, said he was producing too many parts that had to be scrapped. As a member of a bargaining unit represented by Steelworkers Local 3029, he was subject to the terms of a collective bargaining agreement agreeing that neither the employer nor the union would discriminate against any employee or applicant "on account of race, color, religion, sex, national origin, or ancestry." The agreement also contained a grievance and arbitration procedure covering "differences . . . between the Company and the Union as to the meaning and application of the provisions of this Agreement" as well as "any trouble aris[ing] in the plant." 415 U.S. at 39-40. Alexander filed a grievance challenging his discharge.

"In the final pre-arbitration step" of the grievance procedure, "petitioner raised, apparently for the first time, the claim that his discharge resulted from racial discrimination." When the arbitration hearing was held, Alexander "testified that his discharge was the result of racial discrimination," telling the arbitrator he had filed a charge of discrimination with the Colorado Civil Rights Commission "because 'he could not trust the union.' " 415 U.S. at 42. In ruling that Alexander had been "discharged for just cause," the arbitrator said nothing about the racial discrimination claim.

Consequently, it comes as no surprise that this Court had no hesitation in reversing the district court's conclusion, as affirmed *per curium* by a Tenth Circuit panel, that

> petitioner, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII.

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24. *Alexander* was preceded by *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972), in which a writ of certiorari was dismissed as improvidently granted because the union contract in question was confined to grievances "pertaining to a violation of the Agreement," thereby rendering premature any assessment of the issues later addressed in *Alexander* and in *Barrentine*.

415 U.S. at 43. There is no further discussion of "what happened" in the arbitration process.

2. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). Two truck drivers represented by Teamsters Local 878 took grievances to a joint labor-management committee for a "final and binding decision." The grievants sought pay for time "worked," including pre-trip safety inspection and transportation time. After the grievances were "rejected without explanation," the two sued their employer under the Fair Labor Standards Act. Plaintiffs argued they had "no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration," but a majority of this Court treated that factual dispute as immaterial, 450 U.S. at 731 n.4, and held that individual rights to overtime pay cannot be "waived" even if they are submitted to arbitration, declining to accept the arguments of Chief Justice Burger and then-Justice Rehnquist that

> It makes neither good sense nor sound law to read the broad language of *Gardner-Denver* — written in a civil rights *discrimination* case — to govern a routine wage dispute over a matter traditionally entrusted by the parties' arms-length bargaining to binding arbitration.

450 U.S. at 754 (Burger, Ch.J., dissenting) (emphasis in original).

3. *McDonald v. City of West Branch*, 466 U.S. 284 (1984). Gary McDonald, a discharged city police officer, prosecuted an arbitration proceeding under the collective bargaining agreement between the city and the United Steelworkers, contending there was "no proper cause" for his termination. An arbitrator sustained the discharge as based on just cause. McDonald then sued the city and a number of its officials under 42 U.S.C. § 1983, claiming he had been fired for exercising First Amendment rights. A jury returned a verdict against the Chief of Police but in favor of all other defendants. The Seventh Circuit reversed the verdict against the Police Chief due to the arbitrator's award, relying on principles of res judicata and collateral estoppel. This Court, in a brief opinion

citing the holdings and rationales of *Alexander* and *Barrentine*, determined the arbitration award to be devoid of preclusive effect because the 1871 Civil Rights Act was "intended to be judicially enforceable."

The foregoing discussion points strongly to the conclusion that the discrimination claims in *Alexander*, the statutory overtime claim in *Barrentine*, and the constitutional free speech claim in *McDonald* were not submitted to the arbitrators nor were they ruled on by them. The contract in *Barrentine* was quite vague regarding what issues could be grieved and arbitrated, while the decision in *McDonald* only recites the terms of the agreement's "management rights" clause. It is also worth mentioning that in *McDonald* the Union and the AFL-CIO, as *amici*, proudly stated

> that under most collective bargaining agreements the union "controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case."

466 U.S. at 291 n.10. It follows that nothing in the *Alexander/Barrentine/McDonald* fact patterns is pertinent to our case.

IV. RESOLVING THE CONFLICT

As noted at the outset (Respondents' Brief pp. 3-5, *and see* Respondents' Brief in Opposition to Petition for Writ of Certiorari, pp. 7-11), the Fourth Circuit's decision in this case presents no "conflict" with the decisions of other Courts of Appeals. *Wright* stands for the proposition that where the issue to be arbitrated clearly falls within the type of question which the collective bargaining agreement has committed to arbitral resolution, the grievant must *at least* attempt to follow that procedure. Nonetheless, inasmuch as the Petitioner insists that this case is the appropriate vehicle for resolving an intercircuit conflict, it seems appropriate to analyze the conflict which admittedly does exist between the views of the Fourth Circuit, represented by *Austin v. Owens Brockway Glass Container Co.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996), and those of other United States Courts of Appeals.

A. *Austin*

Shortly after *Gilmer* was decided, Congress enacted the Civil Rights Act of 1991, which incorporated as Section 118 the following:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [enacting section 1981a of this title and section 601 of Title 2, The Congress, amending this section, Sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111 and 12112 of this title, and Section 626 of Title 29, Labor, and enacting provisions set out as notes under this section and section 2000e and 2000e-4 of this title].

Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (Nov. 21, 1991).

Congressional approval of alternative dispute resolution, explicitly including arbitration, as a means of achieving settlement of employment discrimination claims, led in turn to the decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996). Rejecting the arguments advanced by the EEOC as *amicus curiae*, *Austin* held that a plaintiff's failure to process employment discrimination claims under a collectively-bargained grievance-arbitration procedure precludes the filing of an ADA lawsuit because such failure deprives a federal district court of jurisdiction over the case.

Recognizing that controlling precedent in that Circuit says that arbitration under a collective bargaining agreement is not governed by the Federal Arbitration Act, the court in *Austin* explained "[t]he language of the statutes could not be any more clear in showing Congressional favor towards arbitration." 78 F.3d at 881. Thus,

> voluntary agreements to arbitrate statutory claims are allowed. To decide otherwise, we would have to hold that *Gilmer* has no effect at all and that *Alexander* is still the law that statutory claims cannot be the subject of required arbitration.

Id at 882.

In conclusion, *Austin* reminds us

> the rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. . . .Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what Miss Austin is attempting to do. We need not decide any question of union good faith in this case (and none has been suggested), because Miss Austin must pursue her claim under the grievance procedure.

78 F.3d at 855 (citations omitted).

B. *Austin* Applied and Rejected.

Since *Austin* was decided, the opinion has been cited in a host of judicial opinions. Inasmuch as the majority of these cases do not involve arbitration pursuant to a collective bargaining agreement, such decisions are listed in the accompanying footnote[25]

25. NASD arbitration: *Seus v. John Nuveen & Co.*, __ F.3d __ (3d Cir. June 8, 1998); *Friedman v. Metropolitan Life Ins. Co.*, 1996 U.S. Dist. Lexis 19889 (S.D.N.Y. June 19, 1996); *Smith v. Lehman Bros., Inc.*, 71 FEP Cas. 1494 (S.D.N.Y. 1996); *Randleman v. New York Life Ins. Co.*, 1996 U.S. Dist. Lexis 13956 (M.D. N.C. Aug. 9, 1996); *Satarino v. A.G. Edwards & Sons, Inc.*, 941 F. Supp. 609 (N.D. Tex. 1996). Employee handbook: *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (10th Cir. 1997); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762 (D. Conn. 1996). Medical services contract: *McCrea v. Drs. Copeland, Hyman & Schackman, P.A.*, 945 F. Supp. 879 (D. Md. 1996). Individual employment contract: *Connors v. Amisub Inc.*, 5 AD Cas. 961 (S.D. Fla. 1996); *Rudolph v. Alamo Rent A Car, Inc.*, 952 F. Supp. 311 (E.D. Va. 1997); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. (Cont'd)

and will not be further discussed in this brief. As to decisions reached in the collective bargaining context, *Austin* has been followed in *Gingles v. Bethlehem Steel Corp.*, __ F.3d __ (4th Cir. Apr. 22, 1998) (mem.); *Nowlin v. Westvaco Corp.*, 1996 U.S. Dist. Lexis 17509 (W.D. Va. June 7, 1996); *Chenowith v. Asplundh Tree Expert Co.*, 928 F. Supp. 605 (D. Md. 1996); *Hampton v. Kroger Co.*, 1996 U.S. Dist. Lexis 14407 (W.D. Va., Sept. 27, 1996); *Bright v. Norshipco.*, 951 F. Supp. 95 (E.D. Va. 1997) *aff'd mem.*, 133 F.3d 913 (4th Cir. 1998); *Jessie v. Carter Health Care Center, Inc.*, 930 F. Supp. 1174 (E.D. Ky. 1996); *Baker v. Kaiser Aluminum & Chemical* Corp., 951 F. Supp. 953 (E.D. Wash. 1996); *Henry v. Colonial Baking Co.*, 952 F. Supp. 744 (M.D. Ala. 1996); *Brummett v. Copaz Packing Corp.*, 954 F. Supp. 160 (S.D. Ohio 1996); *remanded*, __ F.3d __, 1998 U.S. App. Lexis 2144 (6th Cir. Feb. 11, 1998); *Baert v. Euclid Beverage, Ltd.*, 954 F. Supp. 170 (N.D. Ill. 1997); *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569 (D. Conn. 1997); *Humphrey v. Kroger Co.*, 154 L.R.R.M. 3086, 7 A.D. Cas. 383 (E.D. Tenn. 1997); *Moore v. Duke Power* Co., 971 F. Supp. 978 (W.D. N.C. 1997); *Turner v. Bell Atlantic–Virginia, Inc.*, 1997 U.S. Dist. Lexis 11192 (W.D. Va. May 5, 1997); *Brown v. ABF Freight Syst., Inc.*, 1997 U.S. Dist. Lexis 22105 (E.D. Va. Apr. 21, 1997), *reconsideration denied*, 158 L.R.R.M. 2050 (1998); *Williams v. Earthgrains Co.*, 1998 U.S. Dist. Lexis 8147 (W.D. N.C. Apr.

(Cont'd)
Supp. 500 (E.D. Mich. 1997). Application form (signed by employees who were minors at the time): *Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997). Family and Medical Leave Act: *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997); *but see Brown v. Trans World Airlines*, 127 F.3d 337, 342 (4th Cir. 1997) (FMLA claim not arbitrable because arbitration clause was narrowly drawn). There are, of course, many other decisions concerning the arbitration of discrimination claims which do not cite or rely on *Austin*. *See, inter alia, Reese v. Commercial Credit Corp.*, 955 F. Supp. 567 (D. S.C. 1997) (Family and Medical Leave Act claims must be arbitrated pursuant to employer's personnel policy); *Smith v. CPC Foodservice*, 955 F. Supp. 84 (N.D. Ill. 1997) (same under collective bargaining agreement, without reference to *Austin*, and decided before the Seventh Circuit's opinion in *Pryner*.)

22, 1998); *Childs v. Meadowlands Basketball Assoc.*, 954 F. Supp. 994 (D. N.J. 1997) (no reference to *Austin*); *and see, Nalichowski v. Capshaw*, 1996 U.S. Dist. Lexis 14031 (E.D. Pa. Sept. 20, 1996) ("free speech" rights of community college employee under 42 U.S.C. § 1983 and national origin discrimination claims subject to mandatory arbitration, rather than court action; pre-deprivation due process claim allowed to proceed). The same result has been reached, without reference to *Austin*, in *Washington v. Crawford Steel Co.*, 6 AD Cas. 150 (N.D. Ill. 1996). And in *Richard v. Bell Atlantic Corp.*, 1997 U.S. Dist. Lexis 8614 (D.D.C. Feb. 18, 1997), a plaintiff whose claims had been dismissed in an earlier filed case in federal court in Virginia was held estopped to seek a different outcome in another forum; Judge Sporkin found that the *Austin* exhaustion rule was not inconsistent with D.C. Circuit precedent, citing *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). Moreover, although determining that *Alexander* rather than *Gilmer* governed with respect to a plaintiff's sexual harassment claim and that all of the arguments advanced by the employer were unpersuasive, the court in *Krahel v. Owens – Brockway Glass Container, Inc.*, 971 F. Supp. 440, 454-55 (D. Ore. 1997), stayed further proceedings to direct the plaintiff to exhaust the collectively bargained grievance procedure, preserving judicial relief "[i]n the event that plaintiff's worst fears regarding that procedure materialize."

Pryner v. Tractor Supply Co., 927 F. Supp. 1140 (S.D. Ind. 1996) was the first decision to cite on its merits, and to challenge, the *Austin* rationale, insisting, "The fatal flaw in *Austin* is its failure to fully consider the prior holding of *Gardner-Denver*." 927 F. Supp. at 1145. While conceding that *Alexander*'s " 'mistrust of the arbitral process' has plainly been overcome by more recent decisions of the Court," *id.* at 1145, it insisted that *Alexander* was not overruled by *Gilmer*, "and the continuing vitality of *Gardner-Denver* was recognized by the Court even more recently in *Livadas v. Bradshaw*, [512] U.S. [107, 127] n.21 . . . ." *Id.* at 1146. This ruling was affirmed by the Seventh Circuit, 109 F.3d 354, *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997). Judge Posner's opinion first disagreed with the Fourth Circuit's

conclusion that the Federal Arbitration Act is inapplicable to cases arising under a collective bargaining agreement, but then narrowly limited its affirmance of the district court's ruling:

> All we are holding is that the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.

109 F.3d at 363.

Upon careful scrutiny, *Pryner* reveals a deep-seated mistrust of labor arbitration. Even though the employers in that case

> concede[d] that to the extent that the rights conferred by the collective bargaining agreements, or the sanctions available to the arbitrators, fall short of fully vindicating the plaintiffs' substantive and remedial statutory rights, the plaintiffs will be free to resume their suits after the arbitrators render their awards, having filed the suits within the statute of limitations.

the court continued,

> The honey-tongued assurances of the employers' able counsel and their amici, unusually aligned with the unions' interest in controlling their members' access to remedies, do not persuade us that there is no genuine conflict between employer and employee interests in these cases. . . .
>
> The essential conflict is between majority and minority rights. The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit, whether they are a part of the majority or for that matter even members of the union. . . . We may assume that the union will not engage in actionable

> discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor.

109 F.3d at 361-62.

In reaching these highly-subjective conclusions, the court conceded that it had ignored "the precedents," because the parties' briefs had attempted such an analysis, "but in doing so all they have done is identify a circuit split" between *Austin* and *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).[26] The court recognized that *Gilmer* had drawn distinctions from *Alexander* when it could, and perhaps should, have simply recognized that the societal conditions which produced *Alexander* no longer compelled a no-deference result.

> The conservative reading of *Gilmer* is that it just pruned some dicta from *Alexander* — and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights. The issue was not before the court or discussed by it. At the very most the Court may have so distinguished *Alexander* as to deprive it of any authoritative force; but that is the most it did and by doing so opened what till then had been a closed issue.

109 F.3d at 365.

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26. *Varner* held, with only perfunctory discussion, that the *Alexander* rationale "applies to a plaintiff who has chosen not to participate in the grievance procedure," because the statutory prerequisites to suit "do not include exhaustion of grievance procedures under a CBA." The same court had earlier said it would neither "defer to . . . , nor give any weight" to an arbitration award adverse to a Title VII plaintiff, again relying solely in *Alexander*. *Stacks v. Southeastern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994). With respect, this analysis fails to address the issues presented here, and presents no true "circuit split."

Pryner is less significant for the compelling nature of its reasoning than it is for the only real holding it makes:

> the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the contract.

The handful of appellate decisions which have endorsed Judge Posner's opinion in *Pryner* have added little to the analysis. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997), arose on appeal from a jury verdict in favor of a sexual harassment plaintiff on her tort claims but adverse to her allegations under Title VII. The employer's cross-appeal contended that *Austin* deprived the court of jurisdiction over plaintiff's federal claims. Since the court of appeals reversed the Title VII verdict, it was necessary to address the cross-appeal, relying on *Varner*,[27] three pre-*Austin* decisions[28] and a law review article[29] to "adopt the majority view," 112 F.3d at 1453. But a glaring omission in the appellate record renders the entire discussion of this subject in *Harrison* as little more than an academic exercise: the court noted that it did

> not have access to the CBA between Potash and plaintiff's union and therefore do not know what the arbitration clause encompasses. However, there is no indication in Potash's appellate brief that

27. *Varner v. National Super Markets*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 946, 136 L. Ed. 2d 835 (1997) (discussed *supra*. n.26).

28. *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995), *cert. denied*, __ U.S. __ (1996); *Bintner v. Burlington Northern* 857 F. Supp. 1484, 1488 (D. Wyo. 1994); *Randolph v. Cooper Industries*, 879 F. Supp. 518, 521 (W.D. Pa. 1994).

29. Malin, "*Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*," 40 St. Louis U.L.J. 77, 84, 87 (1996).

> plaintiff's union agreed to arbitrate its members' statutory claims.

112 F.3d at 1454 n.2.

The so-called "*Pryner* line of cases" provides a short list of grounds for judicial challenge to the results reached in *Austin*.[30] They can be summarized as follows:

(a) *Austin* is inapplicable where the plaintiff presents "a colorable argument that the arbitration mechanism has failed." *Smith v. United Parcel Serv.*, 947 F. Supp. 190, 194 n.11 (D. Md. 1996). *See also Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 525 (11th Cir. 1997); *Bynes v. Ahrenkiel Ship Mgmt. (U.S.), Inc.*, 944 F. Supp. 485, 487 (W.D. La. 1996); *Lynch v. Pathmark Supermarkets*, 987 F. Supp. 236, 242 (S.D.N.Y. 1997) (following arbitration award adverse to plaintiff who had "a long history of mutual antagonism with coworkers").

(b) That the collective bargaining agreement did not specifically cover statutory claims or the precise issue presented in the discrimination action case as it was filed in court. *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997); *Bush v. Carrier Air Conditioning*, 940 F. Supp 1040 (E.D. Tex. 1996); *Scarborough v. Brown Group, Inc.*, 972 F. Supp. 1112 (W.D. Tenn. 1997); *Nichols v. General Motors Co.*, 978 F. Supp. 743 (S.D. Ohio 1997); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177 (D. Mass. 1997); *Loftis v. Brown & Williamson Tobacco Corp.*, 73 FEP Cas. 1754 (M.D. N.C. 1997); *Cosely v. E.I. DuPont de Nemours & Co.*, 1997 U.S. Dist. Lexis 22509 (E.D. Va. July 24, 1997), *aff'd mem.*, 139 F.3d 888 (4th Cir. 1998); *Glickstein v. Neshaminy Sch. Dist.*, 156 L.R.R.M. 2706, 72 EPD ¶45,126 (E.D. Pa. 1997); *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 576 (S.D. Tex. 1997); *Testerman v. Chrysler Corp.*, 1997 U.S. Dist. Lexis 21392 (D. Del. Dec. 30, 1997) *and see Albertson's, Inc. v. United Food & Commercial Workers*, 1997 U.S. Dist. Lexis 4554 (D. Ida. Mar. 10, 1997) (FLSA claims);

30. For a larger enumeration, *see* Bales, "*Creating and Challenging Compulsory Arbitration Agreements*," 13 Lab. Law. 511 (1998).

Abendschein v. Montgomery County, 984 F. Supp. 356 (D. Md. 1997) (same).

(c) That *Austin* is of no effect if the contract expressly forbids employees "to demand arbitration" or "to institute any action based upon this Agreement for wrongful discharge or because of any breach of this Agreement." *Bynes v. Ahrenkiel Ship Mgmt. (U.S.), Inc.*, 944 F. Supp. 485, 486 (W.D. La. 1996). *And see Krahel v. Owens – Brockway Glass Container, Inc.*, 971 F. Supp. 440, 451-52 (D. Ore. 1997); *Dalton v. Jefferson Smurfit Corp.*, 979 F. Supp. 1187 (S.D. Ohio 1997); *Glickstein v. Neshaminy Sch. Dist.*, 156 L.R.R.M. 2706, 72 EPD ¶45,126 (E.D. Pa. 1997); *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 586 (S.D. Tex. 1997); *cf., Phox v. Allied Capital Advisers, Inc.*, 74 FEP Cas. 809 (D. D.C. 1997) (*Austin* inapplicable where employee cannot demand arbitration).

(d) That, irrespective of contract language, agreements to arbitrate statutory claims under a collective bargaining agreement are "invalid" because "a union may not waive an employee's right under Title VII to bring a claim in federal court," *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040, 1043 (E.D. Tex. 1996), (N.D. Tex. 1996), at least without that employee's "individual consent," *Bynes v. Ahrenkiel Ship Mgmt. (U.S.) Inc.*, 944 F. Supp. 485 (W.D. La. 1996). *See also Buckley v. Gallo Sales Co.*, 949 F. Supp. 737 (N.D. Cal. 1996); *Hill v. American Can Co.*, 952 F. Supp. 398 (N.D. Tex. 1996); *Araiza v. National Steel & Ship Bldg. Co.*, 973 F. Supp. 963 (S.D. Cal. 1997); *Chopra v. Display Producers, Inc.*, 980 F. Supp. 714 (S.D.N.Y. 1997); *Davis v. Houston Lighting & Power*, 990 F. Supp. 515 (S.D. Tex. 1998). *But compare, Martin v. Dana Corp.*, 150 L.R.R.M. 2117 (E.D. Pa. 1994) (dismissing 29 U.S.C. § 185 claim but retaining Title VII claim), *aff'd*, 155 L.R.R.M. 2523, 73 FEP Cas. 1803, 134 Lab. Cas. ¶10,015 (3d Cir.) (affirming dismissal of Title VII claim for failure to exhaust grievance procedure, where collective bargaining agreement gave individual the right to prosecute grievance), *withdrawn*, 114 F.3d 421 (pending *en banc* resolution), *vac. mem.*, 124 F.3d 590, *reversed mem. on panel rehearing*, 135 F.3d 765 (1997).

(e) That a prior arbitration decision, whether favorable to the employer[31] or to the employee,[32] does not bar judicial resolution of the claim even if it is arguably identical to the issue which had been arbitrated.

Finally, a number of opinions simply chose the reasoning of the "*Pryner* line" over that of *Austin*, without any significant amplification of the specific factors deemed controlling, or by a recitation and application of all three of the "distinguishing factors" identified in *Gilmer*, *see Penny v. United Parcel Service*, 128 F.3d 408, 413-414 (6th Cir. 1997); *Johnson v. Bodine Elec. Co.*, __ F.3d __, 157 L.R.R.M. 2897, 76 FEP Cas. 744 (7th Cir. 1998); *Gray v. Toshiba American Consumer Prods., Inc.*, 959 F. Supp. 805 (M.D. Tenn. 1997); *Nieves v. Individualized Shirts*, 961 F. Supp. 782 (D. N.J. 1997); *Kirkendall v. United Parcel Serv., Inc.*, 964 F. Supp. 106 (W.D.N.Y. 1997); *Vargas v. Gromko*, 977 F. Supp. 996 (N.D. Cal. 1997); *Mellody v. Upper Merion Area Sch. Dist.*, 157 L.R.R.M. 2401 (E.D. Pa. 1998).

Arguments (a) through (c) are fact-specific, and hinge upon the language of the agreement and the facts presented in an individual case. Wright presents no argument that "the arbitration mechanism has failed"; the provisions of the SCSA-Local 1422 agreement permit arbitration of "matters under dispute;" the agreement covers "all matters affecting wages, hours and other terms and conditions of employment;" the agreement is intended not to "be violative of any Federal or State law" [Agreement, ¶¶15(B), 15(F), 17, J.A. 43a, 45a-46a, 47a], thereby rendering an issue concerning "qualifications" to be arbitrable and requiring an arbitrator to apply legal definitions derived from the ADA; and the

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31. *Breech v. Alabama Power Co.*, 962 F. Supp. 1447, 1454-55 (S.D. Ala. 1997), *aff'd mem.*, 140 F.3d 1043 (11th Cir. 1998); *Vargas v. Gromko*, 977 F. Supp. 996 (N.D. Cal. 1997); *Lynch v. Pathmark Supermarkets*, 987 F. Supp. 236 (S.D.N.Y. 1997); *Testerman v. Chrysler Corp.*, 1997 U.S. Dist. Lexis 21392 (D. Del. Dec. 30, 1997).

32. *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040 (E.D. Tex. 1996) (first grievance was arbitrated; issue arose over second grievance contending that refusal to comply with arbitration award was retaliatory).

agreement does not prohibit the assertion of claims of or by individuals.

Likewise, since no arbitration has taken place, the fact pattern of alternative (e) is not here. That only leaves the issue of whether an individual's consent to arbitrate can be provided by his exclusive representation, or whether instead only an individual is capable of making such an agreement. The discussion elsewhere in this Brief is, it is submitted, convincing that a collective bargaining representative not only can, but must, be willing to represent those it has won the right to represent when they believe themselves to be the victims of employment discrimination.[33]

V. PETITIONER HAS FAILED TO PROVE A LEGISLATIVE INTENT TO PRECLUDE ARBITRATION

Petitioner's arguments regarding legislative intent are little more than a condensation of the Ninth Circuit's view on the subject. Therefore, it seems appropriate to consider the reasoning process employed by that Court in reaching results which are, at the very least, controversial.

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33. For authorities favoring arbitration of ADA and other statutory discrimination claims, *see inter alia*, Cole, "*A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*," 1997. B.Y.U.L. Rev. 591 (1997); Keene, "*Collective Bargaining and Compulsory Arbitration of Americans With Disabilities Act Claims*," 48 Lab. L.J. 738 (1997); Note, "*Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer, Gardner-Denver and the Americans With Disabilities Act*," 37 B.C. L. Rev. 479 (1996); Comment, "*Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*," 654 U. Chi. L. Rev. 225 (1998); Estreicher, "*Predispute Agreements to Arbitrate Statutory Employment Claims*," 72 N.Y. U.L. Rev. 1344 (1997); *and compare*, Hodges, "*Mediation and the Americans with Disabilities Act*," 30 Ga. L. Rev. 431 (1996). *But see* Coleman & Vasquez, "*Mandatory Arbitration of Statutory Issues Under Collective Bargaining: Austin and its Progeny*," 48 Lab. L.J. 703 (1997); Kelly, "*An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*," 75 U. Det. Mercy L. Rev. 1 (1997).

No jurisdiction in the United States has produced more exceptions to *Gilmer* than the Ninth Circuit.[34] While that court's recent decision in *Duffield v. Robertson Stephens & Co.*, __ F.3d __, 76 FEP Cas. 1450 (9th Cir. 1998) is the farthest departure from the *Gilmer* rationale, it ranges over the entire landscape of the arguments detailed above, plus a few thrown in for good measure. Among those is the legislative intent question: *Duffield* holds that an employer cannot require, as a mandatory condition of employment, that all employees waive "their right to bring Title VII . . . claims in court and instead agree in advance to submit all employment related disputes to binding arbitration." __ F.3d at __, 76 FEP Cas. at 1456, concluding that the plaintiff in that case "met her burden of showing that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of Title VII disputes." __ F.3d at __, 76 FEP Cas. at 1466. *But compare, Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (plaintiff failed to prove intent to preclude arbitration of Title VII claims).

Duffield refers to the Ninth Circuit's earlier decision in *Prudential Insurance Company v. Lai*, 42 F.3d 1299 (1994), *cert. denied*, 516 U.S. 812 (1995), which described the pre-*Gilmer* view: " '[*Gardner-Denver*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims.' " *Lai*, 42 F.3d at 1303, quoted in *Duffield*, __ F.3d at __, 76 FEP Cas. at 1454. Once that interpretation had been dispelled by *Gilmer*, a party (or a court) which wishes to avoid arbitration has a daunting task:

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34. *See generally, Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (agreement to arbitrate is unenforceable unless "knowingly" entered into). *And see Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997); *but compare Seus v. John Nuveen & Co.*, __ F.3d __ (3d. Cir. June 8, 1998), *contra*. Conversely, however, that court declines to permit a plaintiff who "voluntarily initiates binding arbitration" of a statutory claim to disregard the arbitrator's award by presenting the claim in a subsequent action under Title VII. *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1439-40 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994). Such a holding is an express rejection of the heart of *Alexander*.

> In the post-*Gilmer* era, if courts are to hold that an act precludes arbitration of claims to which it gives rise, a more concrete showing is required, including a scrupulous examination of Congress' actions and intent. Further, in examining congressional legislation, it is now incumbent upon courts to consider whether Congress intended to preclude every form of arbitration of claims arising under a particular statute, or whether it intended to preclude only certain forms of arbitration agreements.

__ F.3d at __, 76 FEP Cas. at 1455.

The fallacy inherent in the *Duffield* analysis is demonstrated by its repeated assertion that "compulsory arbitration" — defined by the court as

> the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related claims in a judicial forum,

as distinguished from "systems under which employees agree, or otherwise elect, after disputes have arisen to submit them to arbitration," as well as

> agreements in which at the time of hiring employers give prospective employees the choice to opt in advance for arbitration of all future employment related disputes or for retention of their statutory right to litigate such disputes

__ F.3d at __, 76 FEP Cas. at 1453 — is irreconcilable with a "knowing and voluntary" decision by the individual to "waive" resort to the courts. These premises are untenable.

The second of the three procedures defined by the *Duffield* court — election to arbitrate an existing dispute — is nothing more than a return to common law or, more accurately, common sense. Parties may always settle, litigate, or engage in any variety of dispute resolution procedures unless the claim is of the rare category in which such resolution is statutorily prohibited. Included in the

category of claims which cannot be settled without third-party approval are minimum wage or overtime claims under the Fair Labor Standards Act, *see* 29 U.S.C. § 216(c).[35] That type of issue is, of course, that which produced this Court's decision in *Barrentine*.[36] No similar impediment exists here.

Nor is the third "option" supportable by legislative or judicial authority. *Duffield* says that

> [a]fter the Supreme Court granted certiorari in *Gilmer*, Congress amended the ADEA to provide that all waivers of rights under the Act, apparently including the right to jury trial, 29 U.S.C. §626(c), must be "knowing and voluntary."

__ F.3d at __, n.5, 76 FEP Cas. at 1456, n.5. This is simply untrue. The legislation referred to, the Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f)(1), provides requirements for *releases* of *claims* under the ADEA, and this Court's analysis of the OWBPA in *Oubre v. Entergy Operations, Inc.*, __ U.S. __, 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998); deals only with releases, not with forum choices. *Cf., Adams v. Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1996) (agreement to release a claim); *see Seus v. John Nuveen & Co.*, __ F.3d __ (3d Cir. June 8, 1998) (OWBPA applies to any "waiver of any rights or claim" under the ADEA, but not to a predispute agreement to arbitrate ADEA claims.) The third "option" is, therefore, only an immaterial permutation of the second, in which the employee may elect to arbitrate or not after the dispute arises, with the choice afforded by contract rather than by common sense.

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35. The Secretary of Labor's authority to "supervise" the payment of unpaid wages or overtime has been interpreted as rendering unsupervised waivers or settlements unenforceable, and a settlement for less than the full amount of the claim is of no effect. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

36. *And see Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972) (before *Barrentine*, employees needed to exhaust union contract procedures prior to filing suit under FLSA).

Having demonstrated a predisposition against "compulsory arbitration" and, perforce, a fundamental disagreement with *Gilmer*, the *Duffield* court then proceeded to cobble together a lopsided version of the legislative history of the Civil Rights Act of 1991. Conceding the genesis of Section 118 of that statute in the identical language of two laws passed the previous year — Section 513 of the ADA and Section 18 of the vetoed Civil Rights Act of 1990,[37] the court, after leveling extended but "respectful" criticism at the Fourth Circuit, referred to observations of an individual legislator to the effect that Section 18 was "intended to be consistent with . . . *Gardner-Denver*," with "[n]o approval whatsoever [being] intended of the Supreme Court's recent decision in *Gilmer*" (__ F.3d at __, 76 FEP Cas. at 1461-62, *quoting* Representative Edwards, 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991)). In so doing, the Ninth Circuit panel simply overlooked the section-by-section analysis presented by Senator Dole eight days earlier, at the time of the Senate's adoption of the bill:

> This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.
>
> In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. *See Gilmer v. Interstate / Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

137 CONG. REC. S. 15478 (daily ed. Oct. 30, 1991).

The Third Circuit has an opposing view. In *Seus v. John Nuveen & Co.*, __ F.3d __, 1998 U.S. App. Lexis 11907 (June 8, 1998), Judge Stapleton spoke for a unanimous panel when he stated:

> The EEOC argues . . .that a Congressional intent to preclude predispute waivers of a judicial forum . . . can be discerned in the legislative history of §118

37. __ F.3d at __, n.10, __, 76 FEP Cas. at 1457, n.10, 1460-61.

> [of the Civil Rights Act of 1991]. The EEOC points to two comments by the House Committee on Education and Labor as well as two remarks of individual legislators on the floor to support its position. In our judgment, however, no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach.

As such, therefore, the court in *Seus* said, "we respectfully disagree with . . . *Duffield*. . . ."[38]

What, then, are we to make of this legislative history? Selective quotations, both out of and within the context of their "presentation,"[39] are at best ambiguous, conjuring up Justice Frankfurter's puckish remark in *Greenwood v. United States*, 350 U.S. 366, 374 (1956): "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."

38. Nor does the Third Circuit stand alone. EEOC has had a dress-rehearsal of its legislative history argument across the nation; only the Ninth Circuit and one federal district judge seem persuaded by it. EEOC's position is rejected, in addition to *Seus*, in *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503 (E.D. Mich. 1997), and *Hooters of America, Inc. v. Phillips*, 76 FEP Cas. 1757 (D.S.C. 1998); *compare Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588 (8th Cir. 1998). The contrary view is found in *Duffield* and in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc*, 76 FEP Cas. 681 (D. Mass. 1998), (Gertner, J.) and *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 187 (D. Mass. 1997) (Gertner, J.) (relying on two pre-*Austin* decisions). *And see, Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F. Supp. 440, 447 (D. Ore. 1997) ("Congress clearly knew how to" overrule *Alexander*, but did not do so.)

39. Much of the discussion of alternative dispute resolution is found in committee reports which are not explained in any actual legislative debate, a process described by Judge Gesell in discussing the possible retroactivity of the Civil Rights Act of 1991: "The congressional 'debates' were, with few exceptions, hardly more than a series of declarations and counterdeclarations. . . ." *Van Meter v. Barr*, 778 F. Supp. 83, 84 (D.D.C. 1991) (applying "manifest intention of legislature" test), *app. dism'd*, 976 F.2d 1 (D.C. Cir. 1992).

When the identical language of the two statutes, as well as that of the 1990 Civil Rights Act, is considered in a vacuum, legislative intent continues to be elusive. What is clear, however, is that this Court's direction in *Gilmer*, borrowed from *Mitsubishi* and *McMahon*, must be, and has not been, met by the petitioner: "the burden is on [one who seeks to avoid arbitration] to show that Congress *intended to preclude* a waiver of a judicial forum for [discrimination] claims." *Gilmer*, 500 U.S. at 26, *quoting McMahon*, 482 U.S. at 227.

Nothing in the text or legislative history of the ADA and the 1991 Act "explicitly precludes arbitration." Compulsory arbitration of ADA claims pursuant to an arbitration agreement is no more "inconsistent with the statutory framework and purposes" than was the case in *Gilmer*, 500 U.S. at 26-27. Rather, the post-*Gilmer* enactment of Section 118 of the Civil Rights Act of 1991 and the pre-*Gilmer* adoption of the identically-worded ADA Section 513,[40] neither of which applied to the ADEA provisions analyzed in *Gilmer*, buttressed the view that, *at the least*, Congress had a more positive outlook toward arbitration under those two statutes than it had enjoyed when the ADEA was enacted seven years before *Alexander* and twenty-four years before *Gilmer*. Respondents have no burden of proof on this issue, and the contentions of Petitioner and his *amici* regarding legislative intent remain unproved.

VI. "WAIVER" — NOT OF RIGHTS, BUT OF FORUM.

Whence, then, comes the mischievous word "waiver," which so often carries with it the catchphrase "knowing and intelligent"? Its source is *Alexander*, where Justice Powell used the word in only two contexts: in footnote 10 ("The policy reasons for rejecting the doctrines of election of remedies *and waiver* in the context of

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40. Pub. L. 101-336, Title V, § 513, July 26, 1990, 104 Stat. 377, *codified as* 42 U.S.C. § 12212:

> When appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Title VII are equally applicable to the doctrines of *res judicata* and *collateral estoppel*," 415 U.S. at 49 n.10), and in the discussion beginning at 415 U.S. 51:

> To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [Citations omitted.] These rights are conferred on employees collectively to foster the processes of bargaining . . . Title VII, on the other hand, stands on a plainly different ground: it concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . . Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to prospective waiver. *See Wilko v. Swan*, 346 U.S. 427 (1953).
>
> The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement,* mere resort to the arbitral forum constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the union's bargain struck with the employer.

415 U.S. at 51-52. Footnote 15 of *Alexander*, referring to the above-quoted text at the point of the inserted asterisk, goes on to hypothesize,

> In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned

> on waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission of a claim under the nondiscrimination clause of the collective bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

However, the explanation furnished in *Gilmer* serves to eliminate the precedential weight of virtually all of the *Alexander* "waiver" discussion:

> [B]y agreeing to arbitrate a statutory claim, [a party] does not forego the substantive rights afforded by the statute; [it] only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26; *and see Johnson v. Hubbard Broadcasting, Inc.*, 73 FEP Cas. 8, 17 (D. Minn. 1996) ("an arbitration agreement generally serves only as a specialized choice-of-forum provision which identifies the 'situs of the suit' and the specific set of procedures governing its resolution"). Once this is understood, the discussion regarding who makes the agreed upon forum choice — an individual or representative of that individual — has no logical force.

CONCLUSION

A party cannot be required to arbitrate a dispute unless it has agreed to do so. *Air Line Pilots Ass'n v. Miller*, __ U.S. __, 118 S. Ct. 1761, 140 L. Ed. 2d 1070 (May 26, 1998); *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997). But the public policy favoring dispute resolution by means other than litigation, whether derived from the FAA, the LMRA, or some other source, requires that doubts regarding arbitrability be resolved by the courts by affording the arbitrator an opportunity to adjudicate these issues which fairly can be said to be contemplated in the parties' agreement. Once that step has taken place, the procedures and standards to be followed by the arbitrator and in post-arbitral judicial review will

be ripe for definition. *See, e.g.* Gorman, "*The Gilmer Decision and the Private Arbitration of Public Law Disputes*", 1995 U. Ill. L. Rev. 635 (1995); Icenogle & Shearer, "*Emerging Due Process Standards in Arbitration of Employment Discrimination Disputes: New Challenges for Employers,*" 48 Lab. L.J. 81 (1997); *Cole v. Burns International Security Servs.*, 105 F.3d 1465 (D.C.Cir. 1997). In the posture of this case, however, such instruction would wander far afield from the issues properly before this Court. Likewise, what recourse may or may not be available to Petitioner, given the actions taken and not taken below, is a matter best left to other days and other forums. The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitrations, is encouraged to resolve disputes arising under the Acts amended by this Act.

Civil Rights Act of 1990, § 18 passed October 16, 1990 (Senate), October 17, 1990 (House), vetoed October 24, 1990.

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitrations, is encouraged to resolve disputes arising under this Chapter.

Pub. L. 101-336, Title V, § 513, July 26, 1990, 104 Stat. 377, 42 U.S.C. § 12212.

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitrations, is encouraged to resolve disputes arising under the Acts or provisions of Federal Law amended by this Title.

Pub. L. 102-166, § 118, Nov. 21, 1991, 105 Stat. 1071, 1081, 42 U.S.C. § 1981 note.